No. 12,530

IN THE

United States Court of Appeals

For the Ninth Circuit

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Your petitioners petition for a rehearing of the judgment rendered herein on February 9, 1951, with a written opinion by the Honorable Judge Albert Lee Stephens after a hearing before Judges Stephens, Healy and Bone.

GROUNDS.

I.

In making its decision as indicated by the opinion, the Court evidently accepted as proved the appellee's

unsupported assertion that the appellant's books contained insufficient or improper entries. Actually, the appellant's books and records are complete in every detail, are in order and fully disclose all information required by law and by good bookkeeping practice needed to determine the correctness of appellant's April 1, 1944, physical inventory.

II.

In making its decision as indicated by the opinion, the Court evidently concluded that even if 96.41% of the total sales were distilled spirits sales, sales by the appellant at above ceiling prices might have left him with extra merchandise on hand at April 1, 1944, which he might not have declared. Actually the question of over-ceiling sales is entirely irrelevant to the issues of this case.

III.

The Court in making its decision has permitted a finding that two hundred cases of whiskey were moved to an unknown destination to be the basis of a 600-case assessment.

ARGUMENT.

I.

IN MAKING ITS DECISION AS INDICATED BY THE OPINION, THE COURT EVIDENTLY ACCEPTED AS PROVED THE APPELLEE'S UNSUPPORTED ASSERTION THAT THE APPELLANT'S BOOKS CONTAINED INSUFFICIENT OR IMPROPER ENTRIES. ACTUALLY, THE APPELLANT'S BOOKS AND RECORDS ARE COMPLETE IN EVERY DETAIL, ARE IN ORDER AND FULLY DISCLOSE ALL INFORMATION REQUIRED BY LAW AND BY GOOD BOOKKEEPING PRACTICE NEEDED TO DETERMINE THE CORRECTNESS OF APPELLANT'S APRIL 1, 1944, PHYSICAL INVENTORY.

We respectfully call to the attention of the Court that portion of its opinion which states: "The books of a taxpayer are not conclusive either for or against the Collector under all circumstances. *Bergdoll v. Pollock,* 95 U.S. 337 (1877). If taxpayer's books contain insufficient or improper entries, taxpayer must suffer the consequences." In our opinion, it is on the basis of this alleged insufficiency or impropriety of the books that ultimately the Court rejected the 96.41% figure as the correct figure.

All the evidence in this case is contrary to this supposition. A certified public accountant, J. Bruck, was called as a witness by appellant. His qualifications as a certified public accountant were accepted by the attorney for the appellee (Tr. p. 164.)

He testified that appellant kept a double-entry set of books which in his opinion were complete and properly kept, and from an examination of the records of appellant he could determine appellant's purchases, sales and inventory as of a given period. (Tr. p. 165.)

The report of the State Board of Equalization auditor contained the following reference:

> "Records.
> "1. Do records meet requirements of section 24.4 of the Alcohol Beverage Control Act and the Rules and Regulations issued thereunder?
> "Yes." (Tr. p. 119.)

From the foregoing quotation, it could only be inferred that the records of appellant were such as are required by law, from which records could be determined the percentage of distilled spirits sales against gross sales.

We included in the brief for appellant Schedule I (appendix) which schedule traced every figure in the State Board audit *to the books and records of appellant in evidence in this case,* and we cited the page numbers in said records to which each figure could be traced. Thus it is clear that the statement of the State Board of Equalization auditor regarding the completeness of the records referred to the records in evidence before this Court.

The only testimony offered by appellee regarding the books and records was the testimony of Mr. Hedrick. When Mr. Hedrick was questioned as to what books and records the average retail liquor dealer maintained that the appellant did not maintain, he answered:

> "I was getting cross up. I have made a thorough investigation or thorough investigation *only of this particular liquor store.* The other floor stock tax investigations that I made resulted

in no complications that involved searching investigations. *I am unprepared to state from experience such as you have mentioned whether his records are more or less complete than other stores.*" (Tr. p. 272.) (Italics ours.)

Furthermore, the appellee conducted only one audit procedure on the appellant's records. An audit was made of the purchases from the records of the wholesale liquor dealers, and this audit substantiated the accuracy of appellant's records.

The Government did not offer an expert accountant as a witness to support its position regarding the completeness of appellant's books.

Thus the only reason offered by either the appellee or the Trial Court, and the only grounds suggested by this Court for the conclusion that the books were inadequate or incomplete, was the fact that the so-called *daily sales book* did not fully itemize all sales.

The witness Bruck testified that the permanent records of appellant were in evidence in this case as Plaintiff's Exhibit 14 (Tr. p. 181) and Plaintiff's Exhibit 17. (Tr. p. 205.) There is no evidence in the record to contradict this testimony. It is admitted by all parties, and the record shows, that the permanent records contained the *total sales for each day* and the *total sales for each month* and the *total sales for the entire period of the business.* However, we find the entire accounting system of the appellant is rejected because it did not contain a permanent record that listed individually each and every sale made each day.

Appellee does not contend, and never has, that the permanent records of appellant do not reflect the total sales for each and every day. *There is no requirement of law, accounting principle or business practice* that would be served by the maintenance of a record of the type suggested by the appellee, by the Trial Court, and by this Court.

The appellant testified that the so-called daily sales record was a record maintained by the clerk so that a determination could be made that the clerk deposit all cash received by him. (Tr. p. 136.) A mere examination of Exhibit 18, the so-called daily sales record, supports the appellant's testimony. The exhibit is a group of notebooks, obviously never intended to be retained as a permanent record, and to be used merely as a day-to-day check on the clerks, after which daily check they serve no purpose.

II.

IN MAKING ITS DECISION AS INDICATED BY THE OPINION, THE COURT EVIDENTLY CONCLUDED THAT EVEN IF 96.41% OF THE TOTAL SALES WERE DISTILLED SPIRITS SALES, SALES BY THE APPELLANT AT ABOVE CEILING PRICES MIGHT HAVE LEFT HIM WITH EXTRA MERCHANDISE ON HAND AT APRIL 1, 1944, WHICH HE MIGHT NOT HAVE DECLARED. ACTUALLY THE QUESTION OF OVER-CEILING SALES IS ENTIRELY IRRELEVANT TO THE ISSUES OF THIS CASE.

96.41% of the total sales for the period July 1, 1943, to March 31, 1944, equals the amount of $200,-025.28. (Stipulation par. 4; Tr. p. 27.) If this amount represents sales at ceiling prices, the accuracy of

appellant's physical inventory of April 1, 1944, is established.

While the appellee offered testimony at the trial regarding certain alleged over-ceiling sales by the appellant, appellee's counsel did not refer to said testimony in his brief. Counsel for appellee remained silent although the brief for appellant discussed in detail the testimony regarding alleged over-ceiling sales and concluded that there was no evidence to sustain the contention of appellee. (Brief for Appellant pp. 34-36.) However, this Honorable Court suggested that appellant may have made sales above ceiling prices leaving him extra merchandise on hand which he might be expected to make an effort to conceal.

It has been agreed throughout this case that the OPA mark-up was approximately 33% on cost, or a gross profit of 25% on the selling price. It therefore appears obvious to counsel for appellant that if the recorded sales include merchandise sold in excess of ceiling prices, the gross profits per the records of appellant's liquor store would greatly exceed the 25% gross profits permitted under OPA regulations.

We refer this Honorable Court to Mr. Hedrick's testimony (Tr. p. 45) in which Mr. Hedrick admits that he never made an examination of the records to determine what the gross profits were. However, Mr. Bruck, the appellant's witness, testified that he made a determination of the gross profit per the records for 1943 and for the first three months of 1944. Mr. Bruck testified that the gross profit for 1943 was

27.87% and for January 1, 1944, to March 31, 1944, was 25.89%. When we are dealing with general averages, it is accepted that the individual cases will vary to some slight degree. These gross profit percentages prove most conclusively that the sales per the permanent records do not include sales in excess of ceiling prices.

It is actually a moot and irrelevant inquiry to consider the possibility that appellant either might or might not have dealt in over-ceiling sales that were not deposited in the bank or entered in his books. The question in issue is whether the appellant sold merchandise with a retail sales value of $200,025.28 at ceiling prices between July 1, 1943, and March 31, 1944. The State Board determined the actual cost of merchandise sold between July 1, 1943, and April 1, 1944. They then added 33⅓% to this cost of sales and thus arrived at the appellant's sales at ceiling prices. Each figure in that audit was taken from appellant's books and appellee's audit verified the purchase figures in appellant's books.

The books reflect the sales at ceiling prices. We know that the purchases were recorded at ceiling prices because they were audited by the appellee and found to be correct. We know that the sales were recorded at ceiling prices because the gross profits per the records were approximately 25%. The question of whether the appellant may have exacted illegal payments in excess of ceiling prices which he then pocketed is not in issue in this case unless he is being tried for the crime of exacting said illegal payments.

III.

THE COURT IN MAKING ITS DECISION HAS PERMITTED A FINDING THAT TWO HUNDRED CASES OF WHISKEY WERE MOVED TO AN UNKNOWN DESTINATION TO BE THE BASIS OF A 600-CASE ASSESSMENT.

Counsel for appellant is presently of the opinion, and has always been of the opinion, that with the substitution of the 96.41% figure for the 86% figure in the calculated inventory formula, appellant has sustained the accuracy of his physical inventory and fully accounted for all merchandise purchased by him prior to April 1, 1944.

However, if this Court concludes that we have not met the burden of accounting for the two hundred cases of liquor moved from the warehouse on March 31, 1944, then the primary assessment must be limited to the two hundred cases rather than to six hundred cases.

The Court said on page 6:

> "Taxpayer was bound to produce the best available evidence to explain the occurrences viewed by the Collector's agents and the omissions and inconsistencies in his books."

If the Court concludes that it is still not satisfied that we have explained the occurrences viewed by the agents, namely the so-called truck movements, and have not accounted for this merchandise, we respectfully urge that at the most, we can be said to have failed to dispose of the propriety of a primary assessment on the two hundred cases.

But the opinion of the Court that appellant has not offered the best evidence to explain omissions and inconsistencies in his books is clearly contrary to all the evidence in this case *because no omissions or inconsistencies in those books have ever been established.* What or where are the omissions or inconsistencies? We respectfully ask this Court this question: What evidence could the appellant possibly offer to combat the assessment here in question except by proof of the proper figure to be substituted in the calculated inventory formula in place of the incorrect sales figure used by the appellee?

CONCLUSION.

Appellant respectfully submits that this Court, in the writing of its opinion, erred in the respects hereinbefore set forth, and that a rehearing in this matter should be had.

Dated, San Francisco, California,
March 12, 1951.

Respectfully submitted,
MORRIS M. GRUPP,
LEON SCHILLER,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

We hereby certify that in our opinion the grounds as stated in the foregoing petition for rehearing are well founded and said petition is not interposed for the purpose of delay.

Dated, San Francisco, California,
March 12, 1951.

Morris M. Grupp,
Leon Schiller,
Attorneys for Appellant and Petitioner.